

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA, :
:
v. : 15-CR-00137 (JBW)
:
ERIC LUSTIG, : November 10, 2015
:
Defendant. : Brooklyn, New York
:
-----X

TRANSCRIPT OF CRIMINAL CAUSE FOR PLEADING
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government: UNITED STATES ATTORNEY
BY: DAVID KESSLER, ESQ.
ASSISTANT U.S. ATTORNEY

For the Defendant: MILDRED WHALEN, ESQ.
Federal Defenders of New York, Inc.
One Pierrepont Plaza, 16th Floor
Brooklyn, New York 11201

Court Transcriber: MARY GRECO
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Proceedings recorded by electronic sound recording,
transcript produced by transcription service

I N D E X

Defendant Sworn at Page 5

EXHIBITS

Marked Received

1 Plea Agreement

-- 21

1 (Proceedings began at 12:03 p.m.)

2 THE CLERK: Criminal Cause for Change of Plea, case
3 number 15-CR-137 United States v. Eric Lustig. Counsel, please
4 state your name for the record.

5 MR. KESSLER: Good afternoon, Your Honor. David
6 Kessler for the United States.

7 THE COURT: Good afternoon.

8 MS. WHALEN: Good afternoon, Your Honor. The Federal
9 Defenders of New York by Mildred Whalen and I'm joined here at
10 table with Mr. Lustig.

11 THE COURT: Good afternoon. So just so that we're
12 literally all on the same page, in terms of paperwork for
13 today, I have the docket, I have the element sheet, I have a
14 copy of the indictment, I have the Plea Agreement, and I also
15 have the consent to have a plea taken before a magistrate
16 judge. Is there any other paperwork I should have or --

17 MR. KESSLER: No.

18 THE COURT: Do you all have all of that paperwork?

19 MS. WHALEN: We do. Thank you.

20 THE COURT: For the Government, are there victims to
21 the offense and if so, have you notified them of today's
22 proceeding?

23 MR. KESSLER: Your Honor, my conversations with the
24 FBI agent in charge of this case have led me to understand that
25 there are no identifiable victims at this point. That doesn't

1 mean one will not be identified at some point. If we identify
2 one, we will notify them. But at this point I'm not aware of
3 any.

4 THE COURT: Okay. I'm just going to ask Krista, can
5 we turn the volume up on the microphones?

6 THE CLERK: Is there a green light on yours? Okay.
7 Yes.

8 THE COURT: It might be me, but just --

9 [Pause in proceedings.]

10 MR. KESSLER: Is this better?

11 THE COURT: That's much better.

12 THE CLERK: Can you bring it closer?

13 MR. KESSLER: There we go.

14 THE COURT: Was it not on?

15 MR. KESSLER: It was on.

16 THE COURT: Okay.

17 MR. KESSLER: Just to restate that, my understanding
18 from the case agents at this point in time that there are no
19 identifiable victims so none have been notified. To the extent
20 the Government identifies any victims, we will keep them
21 apprised of future proceedings.

22 THE COURT: Okay. Thank you.

23 So Mr. Lustig, we're here for what I'm told a guilty
24 plea. There's a multi-step process here, so it's going to take
25 a little while, but let's start with me introducing myself. I'm

1 Vera Scanlon. I'm a magistrate judge in this case. We're
2 going to start with me asking the deputy to swear you in.

3 THE DEPUTY: Can you stand and raise your right hand?
4 (AT THIS TIME THE DEFENDANT, ERIC LUSTIG, WAS SWORN.)

5 THE DEPUTY: Okay. Thank you. You can have a seat.

6 THE COURT: Thanks. So as I hope you -- exactly. If
7 you don't mind using the microphone, it's easier for me to hear
8 and easier for us to get a recording.

9 So as you may know, this case is assigned to a
10 district judge. It's is Judge Weinstein. He's the judge
11 who'll make the ultimate decision as to whether to accept your
12 guilty plea, and if he does, to sentence you. You have the
13 absolute right to have the district judge, Judge Weinstein,
14 listen to your plea without any prejudice to you. Do you
15 understand?

16 THE DEFENDANT: Yes.

17 THE COURT: So our plan is that a transcript of
18 today's proceeding will be prepared by a court reporter from
19 the recording of today's proceeding. That's why I was asking
20 everyone to use the microphone so that we get as clear a
21 recording as possible. And that transcript will be provided to
22 the district judge, Judge Weinstein. Judge Weinstein will
23 review the transcript of today's proceeding in connection with
24 deciding whether to accept your plea, and if he does, with your
25 sentence. Do you understand the process?

1 THE DEFENDANT: Yes.

2 THE COURT: Do you wish to give up your right to have
3 the district judge, Judge Weinstein, listen to your plea and
4 instead proceed here before me today?

5 THE DEFENDANT: Yes. I want to proceed, yes.

6 THE COURT: Have you had an adequate -- have you been
7 able to discuss this issue of proceeding before me with your
8 attorney?

9 THE DEFENDANT: Yes.

10 THE COURT: And did you have enough time to do that?

11 THE DEFENDANT: Yes.

12 THE COURT: So in connection with that, I have a
13 form, I mentioned earlier, consent to have a plea taken before
14 a United States Magistrate Judge. Did you review this form
15 with your attorney?

16 THE DEFENDANT: Yes.

17 THE COURT: Do you understand it?

18 THE DEFENDANT: Yes.

19 THE COURT: Are the statements in it correct?

20 THE DEFENDANT: Yes.

21 THE COURT: The first signature on the right-hand
22 side, is that your signature?

23 THE DEFENDANT: Yes, Eric Lustig.

24 THE COURT: And below that, Ms. Whalen, is that your
25 signature?

1 MS. WHALEN: Yes, it is.

2 THE COURT: And then for the Government on the left-
3 hand side, Mr. Kessler, is that your signature?

4 MS. WHALEN: Yes.

5 THE COURT: So Mr. Lustig, did you agree to proceed
6 before me here today voluntarily and of your own free will?

7 THE DEFENDANT: Yes.

8 THE COURT: Has anyone made any threats or promises
9 to you to induce you to agree to have me hear your plea here
10 today?

11 THE DEFENDANT: No.

12 THE COURT: Thanks. So we're going to proceed before
13 me today with this plea proceeding.

14 Mr. Lustig, as I hear your plea I'm going to have to
15 ask you a number of questions to assure myself, and in turn the
16 district judge, that it is in fact a valid plea. If you don't
17 understand what I'm saying or you don't understand the
18 questions I'm asking, please let me know. You can either ask
19 your attorney, she'll try to clarify. If she needs any
20 information from me, she can ask me. After that conversation
21 if you still need to ask me something directly, you can do
22 that. Do you understand?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you understand that you have the right
25 to be represented by an attorney at trial and at every other

1 stage of the proceedings including this one?

2 THE DEFENDANT: Yes, I do.

3 THE COURT: And do you understand that if you can't
4 afford an attorney, an attorney will be appointed for you?

5 THE DEFENDANT: Yes.

6 THE COURT: And you understand that Ms. Whalen has
7 been appointed to represent you?

8 THE DEFENDANT: Yeah, I understand.

9 THE COURT: And do you wish her to be your attorney
10 here today?

11 THE DEFENDANT: Yes.

12 THE COURT: I'm just going to remind you a little bit
13 earlier you took an oath to tell the truth. This means as we
14 go through the questions that I have to ask you, if you answer
15 any of those questions falsely, those answers may later be used
16 against you in a separate prosecution for the crime of perjury
17 or of making a false statement. Do you understand?

18 THE DEFENDANT: Yes.

19 THE COURT: All right. So we're going to start with
20 some background information. What's your full name?

21 THE DEFENDANT: Eric Lustig.

22 THE COURT: And how old are you?

23 THE DEFENDANT: 50 years old.

24 THE COURT: And what's the highest level of education
25 that you completed?

1 THE DEFENDANT: Bachelor of Science.

2 THE COURT: When did you graduate?

3 THE DEFENDANT: 1986.

4 THE COURT: What did you study?

5 THE DEFENDANT: Computer information systems.

6 THE COURT: Where did you go to school?

7 THE DEFENDANT: Murphy College.

8 THE COURT: And a different type of question. Are
9 you presently or have you recently been under the care of a
10 physician?

11 THE DEFENDANT: Yes, I am under --

12 MS. WHALEN: Your Honor, Mr. Lustig suffers from a
13 number of conditions, so I had him get me a list of his
14 medications and I can explain them to you. He suffers from
15 anxiety, depression, obsessive compulsive disorder,
16 hypothyroidism, high cholesterol, acid reflux disease, and
17 osteoporosis. To treat those conditions he takes clomipramine,
18 which is for depression and obsessive compulsive disorder;
19 thyroxine which is for hypothyroidism; lovastatin which is for
20 high cholesterol; escitalopram, which is anxiety and
21 depression; omeprazole which is for acid reflux disease; and he
22 takes prescription amounts of Vitamin D and Vitamin D2 for the
23 osteoporosis.

24 THE COURT: Mr. Lustig, did you hear that list of
25 conditions that Ms. Whalen said that you suffer from?

1 THE DEFENDANT: Yes.

2 THE COURT: Is that list complete?

3 THE DEFENDANT: Yes.

4 THE COURT: And is it correct?

5 THE DEFENDANT: Yes, it is.

6 THE COURT: And then she also read a list of
7 medicines that you take. Did you hear that list?

8 THE DEFENDANT: Yes, I did.

9 THE COURT: And is that list correct?

10 THE DEFENDANT: Yes.

11 THE COURT: And is it complete?

12 THE DEFENDANT: Yes.

13 THE COURT: You mentioned earlier you're under the
14 care of a physician. How often do you see the various, one or
15 more doctors that you're under their care?

16 THE DEFENDANT: The psychiatrist usually maybe once
17 every month or two months depending on whatever he recommends.
18 And then also for the other doctors, my primary care physician,
19 I go there maybe like once every two months to get blood tests
20 and to see if they need to change my medication.

21 THE COURT: Do you see any other doctors on a regular
22 basis?

23 THE DEFENDANT: Oh, I also go to Queens Counseling
24 for Change in Long Island and Queens.

25 MS. WHALEN: That center is psychotherapy. I don't

1 believe that it's medical doctors. It's just counseling for
2 sexual disorders.

3 THE COURT: And how often do you go to the center in
4 Queens?

5 THE DEFENDANT: I tried to go there like every week
6 or so, yes.

7 THE COURT: Do you see any other doctors on a regular
8 basis or doctors, physicians, social workers, anyone providing
9 --

10 THE DEFENDANT: I also go to a --

11 THE COURT: -- mental health care or physical care?

12 THE DEFENDANT: -- psychotherapist that I go to to
13 talk about like the depression and stuff on my own, and I see
14 her like twice a month.

15 THE COURT: And in the last month have you seen these
16 doctors on a regular schedule that you just suggested?

17 THE DEFENDANT: The psychiatrist I have an
18 appointment to see her -- to see him next -- later this month.
19 I missed my appointment last month because of a hearing, a
20 court hearing and I didn't get it rescheduled, and I had a
21 prescription. He made it only -- that one's for two months.
22 So I'm going to go next week to see him. And as far as the
23 psychotherapist, I saw her last night.

24 THE COURT: And how about the medical doctors for the
25 physical conditions?

1 THE DEFENDANT: The medical doctor, I have enough
2 medicine right now so I have planned to go maybe in December or
3 January.

4 THE COURT: Okay. Is there anything about any of
5 those treatments that would interfere with your ability to
6 understand what's going on here today?

7 THE DEFENDANT: No.

8 THE COURT: Have you ever been hospitalized or
9 treated for any mental illnesses?

10 THE DEFENDANT: No.

11 THE COURT: Have you ever been hospitalized or
12 treated for any addiction to drugs or alcohol?

13 THE DEFENDANT: No.

14 THE COURT: In the past 24 hours have you consumed
15 any alcohol?

16 THE DEFENDANT: No.

17 THE COURT: In the past 24 hours have you consumed
18 any narcotic drugs?

19 THE DEFENDANT: No.

20 THE COURT: In the past 24 hours have you taken
21 medications?

22 THE DEFENDANT: Yeah, I took my medicines that I have
23 on the list.

24 THE COURT: Did you take all of them in the required
25 dosage?

1 THE DEFENDANT: Yes.

2 THE COURT: Have you taken any other medicines
3 besides the ones that were on the list that Ms. Whalen
4 described?

5 THE DEFENDANT: No.

6 THE COURT: Is your mind clear as you sit here today?

7 THE DEFENDANT: Yes.

8 THE COURT: Do you understand these proceedings?

9 THE DEFENDANT: Yes.

10 THE COURT: Ms. Whalen, have you discussed this
11 matter with your client?

12 MS. WHALEN: Yes, I have, Your Honor.

13 THE COURT: Do you have any concerns that any of the
14 conditions that you listed and that he confirmed would
15 interfere with his ability to understand what's going on here
16 today?

17 MS. WHALEN: No, Your Honor.

18 THE COURT: Or interfere with his ability to make an
19 informed decision about this case?

20 MS. WHALEN: No, Your Honor.

21 THE COURT: In your opinion, is he capable of
22 understanding the nature of these proceedings?

23 MS. WHALEN: Yes, he is.

24 THE COURT: And in your opinion does he understand
25 the rights that he'll be waiving if he decides to go ahead with

1 the guilty plea?

2 MS. WHALEN: Yes, he does.

3 THE COURT: Do you have any doubts as to his
4 competence to plead at this time?

5 MS. WHALEN: No, I don't.

6 THE COURT: Have you reviewed with him the sentencing
7 guidelines and their applicability in this case?

8 MS. WHALEN: Yes, I have.

9 THE COURT: Mr. Lustig, have you had a sufficient
10 opportunity to review your case with your attorney?

11 THE DEFENDANT: Yes.

12 THE COURT: And have you had any difficulty
13 communicating with Ms. Whalen?

14 THE DEFENDANT: No.

15 THE COURT: Are you fully satisfied with the
16 representation and advice given to you in your case by your
17 attorney, Ms. Whalen?

18 THE DEFENDANT: Yes.

19 THE COURT: Have you received a copy of the
20 indictment?

21 THE DEFENDANT: Yes.

22 THE COURT: Did you read it?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you understand it?

25 THE DEFENDANT: Yes.

1 THE COURT: Did you review it with your attorney?

2 THE DEFENDANT: Yes.

3 THE COURT: Did you have sufficient time to review it
4 with her?

5 THE DEFENDANT: Absolutely, yes.

6 THE COURT: So the indictment includes the following
7 counts. Count 1, receipt of child pornography. Count 2,
8 possession of child pornography. It also includes criminal
9 forfeiture allegations. Ms. Whalen, do you want me to read the
10 charges aloud?

11 MS. WHALEN: No, Your Honor. We'll waive the reading
12 of the charges.

13 THE COURT: Mr. Lustig, I'm going to explain some of
14 your rights in this proceeding and if you were to go to trial.

15 The first and most important thing you should
16 understand is that you don't have to plead guilty even if you
17 are guilty. Under the American legal system the prosecution
18 has the burden of proving the guilt of a defendant beyond a
19 reasonable doubt. If the prosecution cannot or does not meet
20 its burden of proof, the jury at trial has the duty to find the
21 defendant not guilty even if the defendant is in fact guilty.
22 Do you understand?

23 THE DEFENDANT: Yes.

24 THE COURT: What this means is even if you are
25 guilty, you have a choice. It's up to you to decide what to

1 do. It's not your lawyer's choice, or your family's choice, or
2 anyone's choice. It's solely your decision what to do with
3 regard to any plea. You may withdraw your previously entered
4 plea of not guilty and plead guilty as I'm told you wish to do,
5 or you may choose to go to trial simply by persisting in your
6 plea of not guilty. If you do so, you'll make the Government -
7 - meaning continue with your plea of not guilty, you'll make
8 the Government meet its burden of proving your guilt beyond a
9 reasonable doubt. Do you understand?

10 THE DEFENDANT: Yes.

11 THE COURT: So you should know that it sometimes
12 happens in American courtrooms that a jury has returned a
13 verdict of not guilty although everyone else in the courtroom
14 believed the defendant had committed the alleged crime. What
15 the jury was saying in that instance was not that the defendant
16 wasn't guilty, but rather the prosecution had failed to meet
17 its burden of proving the defendant guilty. Do you understand
18 that?

19 THE DEFENDANT: Yes.

20 THE COURT: So it means that you have a choice. You
21 can say to the Government prove the case against me, meet your
22 burden of proving my guilt beyond a reasonable doubt. If you'd
23 like to exercise that right, you would simply say not guilty
24 when I ask you how you plead.

25 If you persist in your plea of not guilty, under the

1 constitution and the laws of the United States you're entitled
2 to a speedy and public trial by a jury with the assistance of
3 an attorney on the charges contained in the indictment. Do you
4 understand?

5 THE DEFENDANT: Yes.

6 THE COURT: At trial you would be presumed innocent.
7 You wouldn't have to prove your innocence. It would be the
8 Government's burden to overcome the presumption of innocence
9 and prove you guilty by competent evidence and beyond a
10 reasonable doubt. Do you understand?

11 THE DEFENDANT: Yes.

12 THE COURT: If the Government did not meet its
13 burden, the jury would have the duty to find you not guilty.
14 Do you understand?

15 THE DEFENDANT: Yes.

16 THE COURT: By pleading guilty you would be giving up
17 your right to have the Government satisfy its burden of proving
18 that you are guilty beyond a reasonable doubt. Instead, you
19 will be admitting your guilt. Do you understand?

20 THE DEFENDANT: Yes.

21 THE COURT: In the course of any trial, the witnesses
22 for the Government would have to come to court and testify in
23 your presence. Your attorney would have the right to cross
24 examine the witnesses for the Government, to object to
25 evidence offered by the Government, and to offer witnesses and

1 other evidence on your behalf. Do you understand?

2 THE DEFENDANT: Yes.

3 THE COURT: Your attorney would also have the right
4 to subpoena or compel witnesses to come to court and testify.
5 Do you understand?

6 THE DEFENDANT: Yes.

7 THE COURT: By pleading guilty and if I recommend
8 that the district judge accept your plea, and that is what the
9 judge does, you're giving up your right to confront the
10 witnesses who would testify against you at trial, you're giving
11 up your right to offer evidence on your own behalf, to compel
12 witnesses to come to court and testify and to raise any
13 defenses you may have. Do you understand?

14 THE DEFENDANT: Yes.

15 THE COURT: At a trial, you would have the right to
16 testify on your own behalf but you cannot be compelled to do
17 so. Under the constitution of the United States a defendant in
18 a criminal case cannot be forced to take the witness stand at
19 his own trial and say anything that could be used against him
20 to show that he is guilty of the crime with which he is
21 charged. So if you decided not to testify, the court would
22 instruct the jury that it could not hold that against you.
23 This is called your right against self-incrimination. Do you
24 understand?

25 THE DEFENDANT: Yes.

1 THE COURT: You understand you would also have the
2 right to testify if you chose to do so? Do you understand
3 that?

4 THE DEFENDANT: Yes.

5 THE COURT: By pleading guilty you're admitting your
6 guilt and giving up your right against self-incrimination. Do
7 you understand?

8 THE DEFENDANT: Yes.

9 THE COURT: If you plead guilty, I'm going to have to
10 ask you questions about what you did in order to satisfy myself
11 and in turn the district judge that you are in fact guilty of
12 the charge or charges to which you are pleading guilty and you
13 will then have to answer my questions truthfully and
14 acknowledge your guilt and you're going to have to do that
15 subject to the oath that you took earlier to tell the truth.
16 Do you understand?

17 THE DEFENDANT: Yes.

18 THE COURT: It's not going to be simply enough for
19 you to say you are guilty. You're going to have to tell me
20 what it is that you did that makes you guilty of the charge to
21 which you are pleading guilty. Do you understand?

22 THE DEFENDANT: Yes.

23 THE COURT: If you do plead guilty and I recommend
24 that the district judge accept your plea, and that's what he
25 does, you will be giving up your constitutional rights to a

1 trial and all the other rights I have just discussed. There's
2 not going to be any further trial of any kind. If the district
3 judge accepts your plea, he will simply enter a judgment of
4 guilty on the basis of your guilty plea. Do you understand?

5 THE DEFENDANT: Yes.

6 THE COURT: If after you are sentenced you or your
7 attorney thinks that the court has not properly followed the
8 law in sentencing you, you can generally appeal your sentence
9 to a higher court. But by pleading guilty you will not, except
10 under limited circumstances, be able to challenge your judgment
11 of conviction by appeal or by collateral attack. Do you
12 understand?

13 THE DEFENDANT: Yes.

14 THE COURT: We're going to talk about the Plea
15 Agreement in a little more detail but I want to note one piece
16 of the Plea Agreement which is Paragraph 4 which relates to
17 your right to appeal. Paragraph 4, the first sentence says,
18 "The defendant agrees not to file an appeal or otherwise
19 challenge by petition pursuant to 28 USC Section 2255 or any
20 other provision the conviction or sentence in the event that
21 the court imposes a term of imprisonment of 71 months or
22 below." So do you understand that limitation on your right to
23 appeal?

24 THE DEFENDANT: Yes.

25 THE COURT: I'm sorry?

1 THE DEFENDANT: Yes.

2 THE COURT: So are you willing to give up your right
3 to a trial and the other rights I have just discussed?

4 THE DEFENDANT: Uh, yes.

5 THE COURT: Are you equivocal about that or are you -
6 -

7 THE DEFENDANT: No, I'm sure.

8 THE COURT: You're sure.

9 THE DEFENDANT: Yeah.

10 THE COURT: All right. So I'm going to go over the
11 Plea Agreement which I've marked as Court Exhibit 1 and I may
12 refer to it just as the agreement or as Court Exhibit 1 as we
13 go along.

14 (AT THIS TIME COURT EXHIBIT 1 MARKED)

15 THE COURT: Have you seen this document, the Plea
16 Agreement?

17 THE DEFENDANT: Yes.

18 THE COURT: Have you read it?

19 THE DEFENDANT: Yes.

20 THE COURT: And have you reviewed it in its entirety
21 with your attorney?

22 THE DEFENDANT: Yes, I did.

23 THE COURT: The last page of the agreement, which is
24 Page 11, in the middle of the page it says I have read the
25 entire agreement and discussed it with my attorney. I

1 understand all of its terms and I'm entering into it knowingly
2 and voluntarily. Do you have a copy there?

3 THE DEFENDANT: Yes.

4 THE COURT: Do you see that sentence?

5 THE DEFENDANT: Yes, I do.

6 THE COURT: Is that a correct statement?

7 THE DEFENDANT: Yes, it is.

8 THE COURT: On the copy that I have up here, I'm
9 going to hold it up, right below that sentence is a signature.
10 Is that your signature?

11 THE DEFENDANT: Defendant? Yes.

12 THE COURT: Right where it says Eric Lustig,
13 defendant.

14 THE DEFENDANT: Yes.

15 THE COURT: Is that your signature?

16 THE DEFENDANT: It is.

17 THE COURT: And below that it says approved by, and
18 typewritten is Mildred Whalen, counsel to defendant. Ms.
19 Whalen, is that your signature?

20 MS. WHALEN: Yes, it is.

21 THE COURT: On the right-hand side, Mr. Kessler, is
22 that your signature, the first one?

23 MR. KESSLER: Yes. My signature is the first one and
24 then below my signature is the signature of Barrett Berger
25 who's a supervising assistant US Attorney in the office.

1 THE COURT: We're going to go over the Plea Agreement
2 in some detail. But Ms. Whalen, were all formal plea offers by
3 the Government conveyed to the defendant?

4 MS. WHALEN: Yes.

5 THE COURT: Mr. Lustig, does the written Plea
6 Agreement which is marked as Court Exhibit 1 accurately
7 represent the entire understanding or agreement that you have
8 with the Government?

9 THE DEFENDANT: Yes.

10 THE COURT: Has anyone made any promise or assurance
11 to you that's not in the Plea Agreement to persuade you to
12 accept the Plea Agreement?

13 THE DEFENDANT: No.

14 THE COURT: Has anyone threatened you in any way to
15 persuade you to accept the Plea Agreement?

16 THE DEFENDANT: No.

17 THE COURT: Do you understand the entire Plea
18 Agreement?

19 THE DEFENDANT: I do.

20 THE COURT: Ms. Whalen, have you read and reviewed
21 with your client the written Plea Agreement which is marked as
22 Court Exhibit 1?

23 MR. KESSLER: Yes, I have.

24 THE COURT: And does it reflect your understanding of
25 the entire agreement that your client has entered into with the

1 Government?

2 MS. WHALEN: Yes, it does.

3 THE COURT: I'm just going to interrupt for a second.

4 [Pause in proceedings.]

5 THE COURT: Okay. Sorry about that.

6 Mr. Lustig, do you understand that if you fail to
7 comply with your agreement with the Government, the Government
8 will be released from its obligations but you will not be
9 released from your plea of guilty?

10 THE DEFENDANT: Yes.

11 THE COURT: We're going to go over the possible
12 consequences of the plea and if it's helpful to you, some of
13 this is written out in Paragraph 1 of Court Exhibit 1.

14 So it's my understanding that as part of this
15 agreement you're going to plead guilty to Count 2 of the
16 indictment. The indictment is the document that we had talked
17 about earlier. Count 2 charges a violation of a particular
18 federal statute which is referred to as 18 United States Code
19 Section 2252(a)(4)(B). Is that correct? That's the count to
20 which you intend to plead guilty?

21 THE DEFENDANT: Yes, it is.

22 THE COURT: So Count 2 carries the following
23 statutory penalties. Maximum term of imprisonment of 20 years,
24 a minimum term of imprisonment of zero years. Do you
25 understand that?

1 THE DEFENDANT: Yes.

2 THE COURT: It carries a minimum supervised release
3 term of five years and a maximum supervised release term of
4 life which would follow any term of imprisonment. If a
5 condition of release is violated, you may be sentenced for up
6 to two years without credit for pre-release imprisonment or
7 time previously served on post release supervision. Do you
8 understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: While on supervised release, there may be
11 many restrictions placed on your liberty. They may include,
12 among other things, travel limitations, requirements that you
13 regularly report to a probation officer, prohibition on
14 carrying guns and other limitations. Do you understand that?

15 THE DEFENDANT: Yeah, I do.

16 THE COURT: If you commit any criminal offense under
17 particular laws Chapter 109(a), 110, or 117, or Title 18 of the
18 US Code Section 1201, or 1591 for which imprisonment for a term
19 longer than one year can be imposed, you shall be sentenced to
20 not less than five years and up to the maximum term of
21 imprisonment for the offense as set forth above in Paragraph 1A
22 which is the 20 years. Do you understand that provision?

23 THE DEFENDANT: Uh, yes.

24 THE COURT: Again, are you equivocal about it or do
25 you understand it?

1 THE DEFENDANT: No, I understand it.

2 THE COURT: All right. A maximum fine of up to
3 \$250,000 may be imposed. You may be subject to restitution
4 which is outlined in Paragraph 12 through 16 of the agreement.
5 Do you understand those provisions?

6 THE DEFENDANT: Yes.

7 THE COURT: We're look in particular at Paragraphs 12
8 through 16 right now. So if you look at Page 7, there are
9 provisions with regard to restitution. Have you read
10 Paragraphs 12 through 16?

11 THE DEFENDANT: Yes, I did.

12 THE COURT: Do you understand them?

13 THE DEFENDANT: Yes, I do.

14 THE COURT: Did you review them with your attorney?

15 THE DEFENDANT: Yes, I did.

16 THE COURT: All right. And are you in agreement with
17 those provisions?

18 THE DEFENDANT: Yes.

19 THE COURT: Going back to Page 2, you will be charged
20 a \$100 special assessment. Do you understand that?

21 THE DEFENDANT: Yes.

22 THE COURT: Other penalties will include sex offender
23 registration pursuant to the Sex Offender Registration
24 Notification Act. That requirement and punishment is described
25 in Paragraph 18 of the Plea Agreement which is the document

1 marked as Court Exhibit 1. Do you understand that possible
2 penalty?

3 THE DEFENDANT: Yes, I do.

4 THE COURT: We're going to look at Paragraph 18 right
5 now. If you could turn to Page 9 of your copy of the Plea
6 Agreement? Have you read Paragraph 18?

7 THE DEFENDANT: Yes, I did.

8 THE COURT: Did you review it with your attorney?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you understand the provision?

11 THE DEFENDANT: Yes.

12 THE COURT: Now going back to Page 2 again which has
13 a list of the possible penalties. Additional possible penalty
14 is criminal forfeiture as set forth in Paragraph 6 through 12.
15 I'm sorry, 6 through 11 of the Plea Agreement which is marked
16 again as Court Exhibit 1. You could turn to Paragraph 6 which
17 starts on Page 5 and goes through Paragraph 11 with regard to
18 restitution. Have you read these paragraphs?

19 THE DEFENDANT: I did.

20 THE COURT: Do you understand them?

21 THE DEFENDANT: Yes.

22 THE COURT: Did you review them with your attorney?

23 THE DEFENDANT: Yes, I did.

24 THE COURT: To the extent they include
25 acknowledgments, do you acknowledge what's said in these

1 paragraphs?

2 THE DEFENDANT: Yes.

3 THE COURT: Let's just look at the rest of the Plea
4 Agreement. What I went over was Paragraph 1. If you look at
5 Paragraph 2 of the Plea Agreement which is marked as Court
6 Exhibit 1. Have you read this paragraph?

7 THE DEFENDANT: Yes, I did.

8 THE COURT: Do you understand it?

9 THE DEFENDANT: Yes, I do.

10 THE COURT: I'm going to provide some more
11 information and we'll come back to Paragraph 2. If you could
12 look at Paragraph 3. Have you read that paragraph?

13 THE DEFENDANT: Yes.

14 THE COURT: Did you go over it with your attorney?

15 THE DEFENDANT: Yes, I did.

16 THE COURT: And do you understand it?

17 THE DEFENDANT: Yes, I do.

18 THE COURT: We'll also look at Paragraph 4. I read
19 earlier the first sentence of Paragraph 4. Have you read the
20 entire Paragraph 4?

21 THE DEFENDANT: Yes, I did.

22 THE COURT: And do you understand it?

23 THE DEFENDANT: Yes.

24 THE COURT: And did you have a sufficient opportunity
25 to review it with your attorney?

1 THE DEFENDANT: I did.

2 THE COURT: If you could also look at Paragraph 5.
3 Have you read that paragraph?

4 THE DEFENDANT: Yeah, I read it and understand it.

5 THE COURT: And did you have sufficient opportunity
6 to review it with your attorney?

7 THE DEFENDANT: Yes.

8 THE COURT: We've already gone over Paragraph 6
9 through 11. Let's look at -- we went over 6 through 11 of this
10 agreement but then we went over 12 through 16. So if you could
11 turn to Paragraph 17. Have you read Paragraph 17?

12 THE DEFENDANT: Okay. I do understand, yes.

13 THE COURT: And you read it?

14 THE DEFENDANT: Yes.

15 THE COURT: And did you have sufficient opportunity
16 to review it with your attorney?

17 THE DEFENDANT: Yeah, I did.

18 THE COURT: All right. And then the final paragraph
19 that we didn't go over yet is Paragraph 19. Have you read that
20 paragraph?

21 THE DEFENDANT: Yes.

22 THE COURT: Did you have sufficient opportunity to
23 review it with your attorney?

24 THE DEFENDANT: Yes, I did.

25 THE COURT: Do you understand it?

1 THE DEFENDANT: Yes, I do.

2 THE COURT: Let me ask counsel for the defendant, Ms.
3 Whalen, is your client a US citizen?

4 MS. WHALEN: Yes, he is.

5 THE COURT: I mention that, Mr. Lustig, because if
6 you were not a United States citizen then your plea might have
7 serious Immigration consequences.

8 So let's talk about sentencing. The sentencing judge
9 does not have complete discretion to impose a sentence outside
10 of the statutory minimum and maximum sentences that are set
11 forth in the statute. And we went over them in our review of
12 Paragraph 1 of the Plea Agreement. Do you understand that?

13 THE DEFENDANT: Yes.

14 THE COURT: As a first step in the sentencing
15 process, the court must consider the advisory sentencing
16 guidelines that have been issued by the United States
17 Sentencing Commission in determining what is a reasonable
18 sentence in a criminal case. As a second step, the judge or
19 the district court must consider whether there are any factors
20 present that would allow a sentencing judge to depart from
21 those advisory sentencing guidelines. The judge may decide to
22 depart upwardly or downwardly.

23 In addition, the court must consider the factors that
24 are set forth in a particular federal statute which we refer to
25 as 18 USC Section 3553(a). The judge must consider those

1 factors against all other facts and circumstances of your case.
2 In doing that, the judge may determine that a non-guideline
3 sentence may be appropriate. The practical import of this
4 process is that until the date of sentencing when the district
5 court has had an opportunity to review the transcript of
6 today's proceeding and determine whether to accept your plea
7 and has received a presentence report about you and had an
8 opportunity to read that and heard from you, your lawyer and
9 the Government, you cannot know with certainty what the
10 guidelines will be or whether there will be grounds for the
11 district judge to depart from those guidelines. You can also
12 not know whether the court will impose a non-guideline
13 sentence. Do you understand?

14 THE DEFENDANT: Oh, yes.

15 THE COURT: Nonetheless, I asked the attorneys to
16 give their best estimate as to what the guidelines are likely
17 to say based upon the facts that are available to them at this
18 time. I just remind you, Mr. Lustig, that you need to keep in
19 mind that this is a guess and the attorneys could be wrong.
20 For the Government, what's your estimate as to what the
21 sentencing guidelines may be?

22 MR. KESSLER: Your Honor, the Government's estimate
23 is the same estimate in Paragraph 2 of the agreement we've been
24 discussing. That is a base offense level of 18, three
25 enhancements of a total of nine points leading to a total

1 offense level of 27. And then we would anticipate a three
2 point reduction for acceptance of responsibility leaving us
3 with an adjusted offense level of 24 under the assumption that
4 the defendant is in criminal history category one. That would
5 be a guidelines range of 51 to 63 months.

6 THE COURT: So let me just ask you based on the
7 calculation in the agreement that I have has the defendant
8 pleading guilty before October 2, 2015.

9 MR. KESSLER: We'll waive that. I'm sorry.

10 THE COURT: Okay. Why don't we note that on here.
11 Okay. So would the agreement be today's date?

12 MR. KESSLER: The agreement is dated as of today's
13 date. To the extent it's a procedural necessity, the
14 Government will certainly move for that additional one point
15 reduction to be added.

16 THE COURT: All right. Would the Government agree
17 that that date of October 2nd could be changed to November 10th
18 which is today's date?

19 MR. KESSLER: Absolutely.

20 THE COURT: All right.

21 MR. KESSLER: And just so the record is clear, Mr.
22 Lustig indicated his willingness to plead guilty before that
23 date of October 2nd.

24 THE COURT: All right. Krista, let me give you this.
25 So Mr. Lustig, with your attorney, if you could

1 review that paragraph and what's been proposed and if you're in
2 agreement with it, is that the date by which you would need to
3 plead guilty to get the benefit of what's described in that
4 agreement is going to be changed to today because it has a date
5 that's more than a month ago. If you're in agreement, Ms.
6 Whalen, if you could initial it and Mr. Lustig, you should
7 initial that change. And I'll ask Mr. Kessler on behalf of the
8 Government to initial the change.

9 Mr. Lustig, do you understand the estimate that the
10 Government just gave?

11 THE DEFENDANT: I do.

12 THE COURT: And with regard to the date change, I'm
13 just going to hold up the Please Agreement which is Court
14 Exhibit 1 and point at Paragraph 2 where the date October 2nd
15 was changed to November 10, 2015. Is the EL noted there, is
16 that your initial? Are those your initials?

17 THE DEFENDANT: It is.

18 THE COURT: And then right next to EL, Ms. Whalen, is
19 that your initial?

20 MS. WHALEN: It is.

21 THE COURT: And then right below that, Mr. Kessler,
22 for the Government?

23 MR. KESSLER: Yes.

24 THE COURT: Okay. So Ms. Whalen, as to your estimate
25 as to what the guidelines will provide for Mr. Lustig?

1 MS. WHALEN: Your Honor, I believe that the estimate
2 set forth in the Plea Agreement is technically correct.

3 THE COURT: So Mr. Lustig, you understand that the
4 attorneys' estimates are not binding on the Government,
5 Probation, or the Court?

6 THE DEFENDANT: I do understand.

7 THE COURT: Do you understand that if their estimates
8 are wrong that will not be the basis for you to be permitted to
9 withdraw your plea of guilty?

10 THE DEFENDANT: I do understand.

11 THE COURT: And your ultimate sentence may -- do you
12 understand that your ultimate sentence may turn out to be
13 different from any estimate your attorney or the Government's
14 attorney may have given you?

15 THE DEFENDANT: Yes, I understand.

16 THE COURT: And you understand that it can turn out
17 because of other statutory sentencing factors the district
18 judge may impose a sentence that's even higher than the one
19 called for by the advisory sentencing guidelines?

20 THE DEFENDANT: Yeah, I understand that.

21 THE COURT: Do you understand that if that turns out
22 to be the case, you would not be permitted to withdraw your
23 guilty plea simply because no one could tell you in advance
24 what your sentence would be. Do you understand that?

25 THE DEFENDANT: Yeah, I understand that.

1 THE COURT: Do you understand that if the district
2 judge accepts your plea of guilty to a felony offense you will
3 be adjudged guilty of a felony and that adjudication may result
4 in a deprivation of valuable civil rights. Those rights
5 include the right to vote, hold public office, serve on a jury,
6 and possess a firearm. Do you understand?

7 THE DEFENDANT: Yeah, I understand.

8 THE COURT: I've gone over many of the possible
9 consequences to you if your plea of guilty is accepted. Do you
10 understand all these possible consequences?

11 THE DEFENDANT: Yes.

12 THE COURT: Did you have a sufficient opportunity to
13 consult with your attorney about them?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you still wish to go ahead with your
16 proposed plea of guilty?

17 THE DEFENDANT: I do.

18 THE COURT: So are you pleading guilty voluntarily
19 and of your own free will?

20 THE DEFENDANT: Yes.

21 THE COURT: Has anyone threatened or forced you to
22 plead guilty?

23 THE DEFENDANT: No.

24 THE COURT: Other than the promises that are
25 contained in the written agreement that you have entered into

1 with the Government, which is the Plea Agreement which has been
2 marked as Court Exhibit 1, has anyone made any other promises
3 to you to induce you to plead guilty?

4 THE DEFENDANT: No.

5 THE COURT: Has anyone made any promise to you as to
6 what your final sentence may be?

7 THE DEFENDANT: No.

8 THE COURT: Are you pleading guilty of your own free
9 will because you are in fact guilty of Count 2 of the
10 indictment?

11 THE DEFENDANT: Yes.

12 THE COURT: Mr. Kessler, is the Government prepared
13 to prove at trial all of the elements of the counts in the
14 indictment against the defendant?

15 MR. KESSLER: Yes.

16 THE COURT: With regard to Count 2 which is the count
17 to which it's proposed that Mr. Lustig plead guilty, what are
18 the elements?

19 MR. KESSLER: We previously provided a sheet listing
20 those elements to the court and to defense counsel. Just to be
21 clear, this is 18 USC 2252(a)(4)(B), possession of child
22 pornography. The elements are that the defendant did knowingly
23 and intentionally possess matter containing one or more visual
24 depictions which visual depictions had been mailed or shipped
25 or transported in and affecting interstate commerce and foreign

1 commerce by using a means in facility of interstate and foreign
2 commerce, or which were produced using materials which had been
3 mailed or shipped or transported by any means including by
4 computer. The production of such visual depictions involved
5 the use of one or more minors engaging in sexually explicit
6 conduct and such visual depictions were of such conduct.

7 THE COURT: Ms. Whalen, do you agree that those are
8 the elements of the charge possession of child pornography
9 which is Count 2 and that's the count to which it's proposed
10 that Mr. Lustig is going to plead guilty?

11 MS. WHALEN: Yes, I do.

12 THE COURT: All right. For the Government, briefly,
13 what are the facts or evidence that the Government would offer
14 at trial to prove the defendant's guilt?

15 MR. KESSLER: So a not exclusive list of the facts
16 and evidence the Government would use would include the images
17 of minors engaging in sexually explicit conduct located on the
18 defendant's computer that was seized from the apartment where
19 the defendant was staying on or about the dates listed in the -
20 - sorry. Several months after the date listed in the
21 indictment when the search warrant was actually executed. The
22 statements made by the defendant that were recorded by FBI
23 agents and the testimony of the FBI agents, the statements to
24 the effect of Mr. Lustig knowingly downloading images of minors
25 engaged in sexually explicit conduct. And I believe that the

1 use of a computer to download the images from the internet and
2 then the storing of those images on a computer will satisfy the
3 sort of third element I've listed in the element sheet which is
4 that the visual depictions have been mailed or shipped or
5 transported in and affecting interstate commerce and so forth.

6 THE COURT: Ms. Whalen, are you in agreement the
7 Government would be able to use that evidence to prove the
8 offense against your client at trial?

9 MS. WHALEN: Yes.

10 THE COURT: Ms. Whalen, do you know of any reason why
11 Mr. Lustig should not plead guilty at this time?

12 MS. WHALEN: No, I don't.

13 THE COURT: Are you aware of any viable legal defense
14 to the charges against him?

15 MS. WHALEN: No, I'm not.

16 THE COURT: Mr. Lustig, are you ready to plead?

17 THE DEFENDANT: Yes, I am.

18 THE COURT: Do you wish to have any additional time
19 to speak with your attorney?

20 THE DEFENDANT: No, I guess not. No.

21 THE COURT: I can give you the time if you need it.

22 THE DEFENDANT: No.

23 MS. WHALEN: If you have a question?

24 THE DEFENDANT: Actually, I have one.

25 THE COURT: Okay. So we're going to just turn off

1 the microphone so you'll hear some noise in the background, if
2 we can figure out how to do that on this. Do you know how to
3 do that?

4 [Pause in proceedings.]

5 THE DEFENDANT: Thank you.

6 THE COURT: Sir, did you have sufficient time to
7 consult with your attorney?

8 THE DEFENDANT: Yes, I did.

9 THE COURT: You don't need any more time, is that
10 correct?

11 THE DEFENDANT: No, I'm good. Thanks.

12 THE COURT: So with regard to Count 2 of the
13 indictment which charges a violation of 18 USC Section
14 2252(a)(4)(B) which is possession of child pornography, how do
15 you plead; guilty or not guilty?

16 THE DEFENDANT: Guilty.

17 THE COURT: Mr. Lustig, at this time you need to tell
18 me what it is that you did such that you are in fact guilty of
19 that charge which is possession of child pornography.

20 THE DEFENDANT: On November 14, 2014 I knowingly
21 possessed pictures of children showing their genitals on my
22 computer. My computer was located in Brooklyn, New York. I
23 had received these pictures over the internet.

24 MS. WHALEN: Judge, I can perhaps clarify.

25 THE COURT: Yes.

1 MS. WHALEN: The definition of sexually explicit
2 conduct --

3 THE COURT: That's exactly --

4 MS. WHALEN: Yeah. It includes the lascivious
5 display of genitals. My understanding in my review of the
6 discovery in the case was that it was atypical in that there
7 was no -- there were no depictions of sexual intercourse, but
8 there were depictions of children lasciviously displaying their
9 genitals.

10 THE COURT: So Mr. Lustig, do you agree that the
11 materials that you just described as being on your computer
12 included children with a lascivious display of their genitals?

13 THE DEFENDANT: Yeah, they were showing their
14 genitals, yes.

15 THE COURT: Part of that answer is really the
16 question of whether the display was a lascivious display.

17 MS. WHALEN: I can resolve that.

18 [Pause in proceedings.]

19 THE COURT: Okay. I'm sorry. Hold on. It's a new
20 microphone system so we're still trying to master it.

21 So as to the element that relate -- or as to the
22 facts that relate to the element of sexually explicit conduct -

23 -

24 THE DEFENDANT: They were posing with showing their
25 genitals similar to like depictions you would see in Playboy.

1 THE COURT: When you say they, you mean they children
2 who were shown in the pictures that were on your computer?

3 THE DEFENDANT: Yes.

4 THE COURT: All right. For the Government, is that
5 allocution sufficient?

6 MR. KESSLER: Well, a couple of things, Your Honor.
7 First of all, I believe Mr. Lustig stated that he engaged in
8 the conduct he described in November of 2014. The indictment
9 charges that the conduct occurred in October. I believe the
10 defendant just misspoke because I believe his --

11 MS. WHALEN: No --

12 THE COURT: No, possession is --

13 MR. KESSLER: I'm sorry. My mistake.

14 THE COURT: The first one was October, but this is a
15 plea to the second count.

16 MR. KESSLER: I withdraw that. The second thing is
17 there are two additional facts which the defendant did not
18 allocute to, but I believe does not dispute, so I will just
19 state them and then we can see whether or not I am in fact
20 correct.

21 The first is that the images were of prepubescent
22 minors, and the second is that the total offense involved 600
23 or more images. I understand that the defense may have legal
24 arguments about whether or not -- or how those facts affect the
25 guidelines calculations or sentencing and I understand we'll

1 save that for another day. But my understanding is that the
2 actual facts that I've just stated are not disputed.

3 MS. WHALEN: They're not, Your Honor. They are
4 sentencing enhancements. The maximum term of imprisonment is
5 increased from ten to 20 years if there are prepubescent minors
6 involved and the fact that there are 600 or more images is a
7 fact for the sentencing guidelines which I believe is set forth
8 in the Plea Agreement. We don't dispute those two factual
9 issues. My only statement would be that in light of United
10 States v. Dorvee and the Sentencing Commission's report on
11 sexual offenses we will be arguing that while that technical
12 guideline applies, that's not the appropriate sentence for Mr.
13 Lustig.

14 THE COURT: So reading the elements, I don't think at
15 this time he needs to allocute to those but the two facts --
16 you would like a clear record I understand for the sentencing
17 purposes.

18 MR. KESSLER: Or if we need a Fatico hearing later.

19 THE COURT: Right. So what's your position?

20 MS. WHALEN: I guess for sentencing purposes, yeah,
21 we don't dispute that the maximum is increased because of the
22 fact that there were prepubescent minors on the computer. And
23 again, with the 600 images, we don't dispute that there
24 factually were 600 images or more --

25 THE COURT: Or more, correct.

1 MS. WHALEN: -- on Mr. Lustig's computer.

2 MR. KESSLER: That completes my --

3 THE COURT: All right. So the allocution as to Count
4 2, possession of child pornography, that Mr. Lustig gave, is
5 that satisfactory with the Government?

6 MR. KESSLER: Yes, Your Honor.

7 THE COURT: Ms. Whalen, anything else you'd like your
8 client to add to the record?

9 MS. WHALEN: No, Your Honor.

10 THE COURT: So we have a sentencing date which is
11 February 23, 2016 at 10 a.m. before the district judge.

12 Ms. Whalen, for the preparation of the presentence
13 report would you like to be present?

14 MS. WHALEN: Yes, and we actually have scheduled it
15 for after the guilty plea today.

16 THE COURT: Well that's very efficient. With regard
17 to the Plea Agreement, I'm going to give the original back to
18 you and let me just then -- anything else we need to cover?
19 And then I'll just put my recommendation on the record.

20 MR. KESSLER: The only other thing, Your Honor, would
21 be there's still Count 1 of the indictment. It is the
22 Government's intention to dismiss that count upon the
23 acceptance of the plea by the district judge. But for now we'd
24 ask that time be excluded with respect, to the extent it's
25 necessary, with respect to that count given the ongoing plea

1 discussions and the plea entered in Count 2 between now and the
2 date of sentencing.

3 MS. WHALEN: To the extent that's necessary, we have
4 no objection.

5 THE COURT: Okay. So the time between today and
6 February 23rd is excluded to the extent that this is the first
7 time I've gotten this request. Did I miss something?

8 MR. KESSLER: We spent a fair amount of time thinking
9 about the Speedy Trial Act recently and it's not clear to me
10 that a guilty plea with respect to one count in an indictment
11 affects the clock for other counts of the same indictment. So
12 better safe than sorry is my view. But we can also make the
13 request of the district judge if the court would prefer.

14 THE COURT: No. Let me just -- I saw the time
15 excluded but let me just make sure. Let me just finish the
16 plea piece of this --

17 MR. KESSLER: Sure.

18 THE COURT: -- so the record is clear and then we'll
19 talk about that.

20 So just so the record is clear, based on information
21 given to me here today and the documents that were provided to
22 me, I find that the defendant, Mr. Lustig, is fully competent
23 and capable of entering an informed plea, that he's acting
24 voluntarily, that he's aware of the nature of the charges
25 against him, that he understands his rights, that he

1 understands the consequences of his plea and there is a factual
2 basis for the plea to Count 2 of the indictment which is the
3 possession of child pornography and that factual basis provided
4 in the record contains an independent basis in fact as to each
5 of the essential elements of the offense. So I therefore
6 recommend that the district judge, Judge Weinstein, accept the
7 plea of guilty to Count 2 of the indictment.

8 And then what we were talking about was the Speedy
9 Trial Act and Mr. Lustig, it's a technical issue which I
10 suppose is not completely developed in this circuit, so you may
11 have previously been informed of this but just so the record is
12 clear, with regard to Count 1 which technically still remains
13 open and hasn't yet been dismissed because as I said when we
14 started this process what we're doing is I was hearing your
15 plea and during that process I explained to you your rights and
16 how the sentencing would work, but it's Judge Weinstein who
17 decides whether to accept your plea, and if he does, to
18 sentence you. So the issue of the dismissal of Count 1 will
19 also be presented to Judge Weinstein. So do you understand how
20 there's a bit of gap in time between now and you've provided
21 your plea to me and your sentencing date which is February 23rd
22 of next year before Judge Weinstein and --

23 THE DEFENDANT: I would just like to review that for
24 a second.

25 THE COURT: I know it's a little complicated. We're

1 sort of mixing things. We've gone from the plea back to the
2 Speedy Trial Act, so yes, let Ms. Whalen talk to you about it
3 and then come back and I'll explain a little bit more.

4 [Pause in proceedings.]

5 THE COURT: All right. So I'm going to try to state
6 it clearly. If it lines up with what Ms. Whalen said, then
7 we're good to go here which is you've been previously told
8 about the Speedy Trial Act. The Speedy Trial Act requires that
9 you go to trial within 70 days of the date of the indictment
10 but there can be periods of excludable delay or time that
11 doesn't count towards that speedy trial clock. If the
12 Government failed to bring you to trial in time within the 70
13 day period that didn't count those periods of excludable delay,
14 then you could bring a motion to dismiss the charge against
15 you. And what I'm going to ask after I get a little more of an
16 explanation is whether you are in agreement with the
17 application here which is to exclude the time between today
18 which is November 10, 2015 and your sentencing date which is
19 presently February 23, 2016. The reason this comes up here
20 even though we've gone through the plea proceeding with regard
21 to Count 2 in the indictment is because the indictment had two
22 counts against you, Count 1 and Count 2, and as part of this
23 plea process what has been proposed is if your plea is accepted
24 by the district judge, which we won't know until you get to
25 your sentencing date, then the Government will move to dismiss

1 Count 1 of the indictment. But technically until you get to
2 the sentencing date and the plea process is concluded, there's
3 no determination as to Count 1. So that's why you've heard
4 this Speedy Trial Act application for an order of excludable
5 delay before and that's why it's coming up here again. So it's
6 a little bit of apples and oranges, plea and the Speedy Trial
7 Act. But do you understand the speedy trial --

8 THE DEFENDANT: Yes, now I understand.

9 THE COURT: All right. Did you have a sufficient
10 opportunity to review it with Ms. Whalen?

11 THE DEFENDANT: Yes.

12 THE COURT: And are you in agreement with the
13 application?

14 THE DEFENDANT: Yes.

15 THE COURT: Has anyone forced you to agree to this
16 application?

17 THE DEFENDANT: No.

18 THE COURT: Has anyone made any promise is to you --

19 THE DEFENDANT: No.

20 THE COURT: -- to agree to the application?

21 THE DEFENDANT: Nobody made any promises.

22 THE COURT: Okay. So based on what's been said here
23 today by counsel and by the defendant, I find that the entry of
24 an order of excludable delay from today, November 10th to
25 February 23, 2016 is in the defendant's interest and the

1 People's interest and the interest of justice, so the time is
2 excluded.

3 I think we've covered our bases. The plea, the
4 Speedy Trial Act, sentencing date. Anything else?

5 MS. WHALEN: No, Your Honor. Thank you.

6 MR. KESSLER: No, Your Honor.

7 THE COURT: Mr. Lustig, stay in touch with your
8 attorney and follow through on this preparation of the
9 presentence report.

10 THE DEFENDANT: Thank you, Your Honor.

11 THE COURT: All right. Take care. Good luck.

12 (Proceedings concluded at 12:58 p.m.)

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

4
5 _____
6 Mary Greco

7 Dated: December 15, 2015
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